

Summary Comments on Chapter 105 Aquatic Resource Compensation Concept ^(5, 6)

January 23, 2009

Over the course of two meetings, the work group focused on a draft Chapter 105 Aquatic Resource Compensation concept document proposed by the Program. The draft document outlined concepts for establishing a comprehensive aquatic resource in-lieu-fee (ILF) program entitled Pennsylvania Integrated Ecological Services, Capacity Enhancement, and Support (PIESCES) Program.

Many group members commented with support for the concept PIESCES Program. The group stressed the importance of the current Chapter 105 requirements that avoidance and minimization measures are required first. The following is a summary of comments submitted by individual group members that the program will consider when further developing and implementing the PIESCES Program. This list of comments does not represent a consensus among group members nor an endorsement by the workgroup as a whole. Detailed discussions of these items can be found in the meeting minutes of the Adhoc Workgroup.

Compensation Program Initiative section ⁽⁶⁾

- Some members request a distinct statement that buffers, enhancement and preservation are acceptable compensatory mitigation methods if these address watershed needs now, other members disagree that buffers and preservation are acceptable mitigation measures because they do not ensure no-net-loss. ⁽⁶⁾
- The Federal Mitigation Rule (Rule) is not embraced in full by the PIESCES Program concept; please indicate if buffers, enhancement and preservation mentioned in the Rule will be incorporated within the regulatory revision. More specific comments on the Rule include the following:
 - Some members disagree with the preference for banking and ILF program usage over on-site compensation for wetland and stream compensation; other members agree with the preference for banking and ILF programs and would like to see the Pennsylvania wetland program (especially the hierarchy) be consistent with the Federal Mitigation Rule. ⁽⁶⁾
 - Individual decisions on compensatory mitigation are not required to choose the 3rd party mitigation option under the Rule; language in the Rule requires the District Engineer to choose the “environmentally preferable” option.
 - Irrespective of the federal rule, Pennsylvania may employ more stringent program requirements that could offer a higher level of protection for the resource and, moreover, the 105 program is authorized under state statutes and is therefore a state specific program. Accordingly, there is no need for the Department of Environmental Protection (DEP) to change its mitigation hierarchy to align with the Rule.
 - Several members express interest in partnering with the DEP as the Compensation Program Initiative is developed.

Mitigation Process section ⁽⁶⁾

- Recommend a statement be inserted to reinforce and clarify existing regulations that if the environmental impacts can't be avoided or minimized, and DEP determines that the project will cause a significant adverse impact on the wetland, DEP also has the option of not authorizing the activity.

Wetland Compensation Considerations section ⁽⁶⁾

- The "Secondary Effects of the Project" analysis should include a land use risk assessment for nutrient and sediment impacts.

- The word "critical" in the definition of "Physiographic Resource Priorities" should be changed to another adjective. "Critical habitat" is a phrase defined by the federal Endangered Species Act and its implementing regulations, and using it out of an ESA context will confuse applicants.
- Existing and in-progress agreements may require some modification of language so that applicants may use the in-lieu fee program regardless of whether a mitigation bank could be established in a given service area under other agreements.

Waterway Compensation Considerations section (6)

- DEP should evaluate existing and ongoing programmatic compensation opportunities to ensure a seamless transition to an aquatic resource ILF program established under the Federal Mitigation Rule.
- Compensation projects should focus on comprehensive restoration of severely altered streams (for example, daylighting of streams, restoration of channelized streams in urban settings, stream channel and floodplain restoration of "legacy sediment" impacted streams, etc.). There is potential value in an ILF program to compensate for more minimal impacts such as culverts/road crossings, where funds can be used for a comprehensive restoration project such as those suggested above.

General comments (5, 6)

- The items outlined in the draft Aquatic Resource Compensation Package are a positive shift. A banking or in-lieu-of fee (ILF) program will allow flexibility and expedite projects. It would also be good to retain the ability (even if it is a second or third choice) to conduct the mitigation on site if suitable, and that seems to be what the DEP is suggesting. (6)
- Recommend that the DEP continue working with the committee that has already been established to provide technical expertise in developing rapid assessment methodology for aquatic resource compensation.
- Mitigation projects under the proposed PIESCES program must clearly be justified in terms of their water quality and watershed restoration benefits as shown in very detailed watershed assessment and restoration plans.
- This proposal must be carefully crafted so that the DEP does not become overly dependent on an ILF program to fund restoration projects.
- Watershed planning, assessment and monitoring must be initiated.
- An in-lieu-fee (ILF) program fee schedule must represent the full cost of mitigation and be consistent with the Federal Mitigation Rule. (5)
- The availability of current staffing must be sufficient, and have required technical expertise. Training should include watershed planning and wetlands assessment components.
- Replacement ratios may exceed 1:1 when considering circumstances such as spatial and temporal losses and geographic location of service areas, in accordance with the Federal Mitigation Rule.